STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

KEVIN KAVANAUGH,

Defendant-Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 330359

Lower Court No. 2014004247 FH

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APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People seek leave to appeal from the Court of Appeals' published July 6, 2017 opinion reversing the trial court's denial of defendant's motions to suppress evidence found after his car was stopped. *People v Kavanaugh*, ___ Mich App ___; ___ NW2d ___ (2017) (Docket No. 330359).

This case involves legal principles of major significance to the state's jurisprudence. MCR 7.305(B)(3). First, what standard of appellate review applies to factual findings based on video evidence? And second, should parties be obliged to provide video evidence to the trial court and make it part of the record on appeal "whenever practicable," as the Court of Appeals proclaimed?

The People ask this Court to hold that the clear error standard of review applies to factual findings based on video evidence, and that parties are no more obliged to provide video evidence than any other kind of evidence. The People further ask the Court to peremptorily reverse the Court of Appeals majority opinion and reinstate defendant's conviction. In the alternative, the People request that this Court grant leave to appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. In holding that the police lacked reasonable suspicion to prolong the traffic stop, the Court of Appeals applied the wrong standard of review to the trial court's factual findings based on a video recording and ignored the defendant's apparent attempt to hide something. Absent these errors, the evidence supported the trial court's conclusion that reasonable suspicion existed. Should this Court reverse the Court of Appeals and clarify that the clear error standard of review applies to factual findings based on video evidence?

Plaintiff-Appellant answers: "YES"
Defendant-Appellee answers: "NO"
The trial court was not presented with this question.
The Court of Appeals majority answered: "NO"

II. The Court of Appeals declared that "whenever practicable," parties "should" provide video evidence to the trial court, the trial court "should" review it, and it "should" be made part of the record on appeal. This language could be interpreted as imposing obligations instead of merely offering advice. Should this Court clarify that parties and trial courts remain free to decide if and how to use video evidence?

Plaintiff-Appellant answers: "YES"
Defendant-Appellee answers: "NO"
The trial court was not presented with this question.
The Court of Appeals majority answered: "NO"

STATEMENT OF FACTS

In a bench trial, The Honorable Charles T. LaSata found defendant guilty of possession with intent to deliver 5 kilograms or more but less than 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii) (Tr II[1] at 75). Judge LaSata sentenced defendant to 90 days in jail and 18 months' probation (S Tr at 21-22).

Grand Rapids Police Officer Jose Gamez was assigned to the Metropolitan Enforcement Team (MET), a narcotics squad (Tr I at 84). One morning, Gamez observed defendant engaging in suspicious behavior[2] in the parking lot of the Grand Village Inn, a hotel known for narcotics trafficking and other criminal activity. *Id.* at 84-86, 98. When defendant later got into the car and drove away, along with a female friend later identified as Billie Sue Brown, Gamez followed them along Highway I-196 to Berrien County. *Id.* at 21, 89, 92-93. Along the way, Gamez contacted other MET members, alerting them to be on the lookout for a silver Honda Accord with a paper Florida plate. *Id.* at 94, 97, 102-103. The MET relayed the alert, but not Gamez' observations, to the Michigan State Police (M Tr at 27; Tr I at 54, 94).

Trooper Michael Daniels, having received this information, sat in his squad car in the median of I-196 in Berrien County, watching the southbound traffic (M Tr at 14, 27; Tr I at 15, 54). A silver Honda Accord passed him, and defendant (the driver) looked at Daniels, which was unusual (M Tr at 14; Tr I at 16-17, 21). In one of his car mirrors, Daniels saw that the Accord had a paper license plate, which was flapping (M Tr at 14-15; Tr I at 16-17, 21). Daniels

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[1] "Tr" refers to the trial transcript and is followed by the appropriate volume number in Roman numerals. "S Tr" refers to the transcript of sentencing held on November 2, 2015. "M Tr" refers to the transcript of the hearing on defendant's motion to suppress, held on January 15, 2015.

[2] Defendant came out of the hotel carrying two duffel bags. He went to a car with a temporary Florida license plate, looked around furtively, put the bags down, opened the trunk, and put the bags in. Defendant closed the trunk, continuing to look around, before going back into the hotel (Tr I at 85-86).

began following the Accord to get a better look at the plate (M Tr at 15; Tr I at 17). When he caught up to the Accord, it started to slow down and made a quick lane change to an exit ramp without signaling (M Tr at 16; Tr I at 17).

Daniels activated his overhead lights (M Tr at 16; Tr I at 17). The Accord continued up the exit ramp for about 20 seconds, during which time Daniels saw defendant appear to make furtive movements as though trying to hide something (M Tr at 17-18, 35; Tr I at 17-18).

When the Accord stopped, Daniels got out of his patrol car and approached it (M Tr at 18; Tr I at 20). Brown was in the front passenger seat, and a small dog was in the back seat. In response to Daniels' request, defendant handed over a Florida driver's license, and Daniels noticed that defendant's hand was shaking (M Tr at 18; Tr I at 20). Daniels asked for paperwork on the Accord, but defendant said he did not have it because he had just purchased the car. Daniels asked for a purchase agreement, but defendant did not have that either (M Tr at 18-19; Tr I at 20).

Daniels had defendant come with him to the patrol car and asked him to sit in the front seat (M Tr at 19-20; Tr I at 21-22). Defendant sat in the front passenger seat, but did not close the door, which was unusual (M Tr at 20; Tr I at 22). Daniels sat in the driver's seat of the patrol car and conversed with defendant while checking defendant's driver's license against computer records. Defendant told Daniels he had been in Grand Rapids for three days visiting friends (M Tr at 20; Tr I at 22). He said he had stayed at the Travel Lodge Hotel (M Tr at 22; Tr I at 22). Brown, he said, was just a coworker, not his girlfriend (M Tr at 21; Tr I at 26). Defendant became increasingly nervous during the conversation, scratching his leg and head, not making eye contact, and repeatedly looking out the passenger-side door, where his body was pointed

(M Tr at 20; Tr I at 22). His nervousness was greater than what Daniels usually observed (M Tr at 36).

Daniels returned to the Accord to check the vehicle identification number against the one that had appeared on his computer screen (M Tr at 21; Tr I at 23, 26). He spoke with Brown, who told him that she and defendant had stayed at the Grand Village Inn[3] in Grand Rapids, and that defendant was her boyfriend (M Tr at 21; Tr I at 26; 74).

Back at his patrol car, Daniels told defendant he would give him a warning for failing to signal (M Tr at 22; Tr I at 27). Daniels asked if there was anything illegal in the car, such as marijuana, cocaine, heroin, or other drugs. Defendant said no to all of these and stated that he did not do drugs. Daniels asked for consent to search the car, and defendant refused (M Tr at 22; Tr I at 27). Daniels then advised defendant that he was going to have a canine unit come to the scene and sniff around the car to make sure it did not contain narcotics (M Tr at 22; Tr I at 28).

Deputy Jason Haskins arrived with a drug-sniffing dog about 10 minutes later – about 22 minutes after Daniels had stopped the Accord (M Tr at 8, 40, 43; Tr I at 76, 137). The dog circled the car twice and alerted to the trunk (M Tr at 23; Tr I at 139-140). Troopers John Moore and Russell Bawks[4] arrived and helped Daniels search defendant's car (M Tr at 24; Tr I at 28, 109, 125). Opening the trunk, the troopers found about 15 pounds of marijuana in 15 heat-sealed bags inside a duffel bag (M Tr at 24; Tr I at 126-127; Tr II at 16-17, 20). Under the driver's seat were some marijuana cigarettes and a container of marijuana butter or wax (M Tr at 35; Tr I at 127-129; Tr II at 16). In between the car seats was a ledger that appeared to be related to drug proceeds (Tr I at 110). Lieutenant Jamie Zehm, an expert in the sale and distribution of

[3] At the motion hearing, Daniels said that Brown named the "Grand Travel Lodge." But on the squad car video, Brown clearly says, "Grand Village." Daniels asks, "Grand Village Inn?" and Brown answers, "Yes" (Video, 13:54 – 13:57).

[4] Trooper Bawks' name is incorrectly transcribed as "Baluks."

controlled substances, testified that the amount and packaging of the marijuana indicated the intent to deliver it (Tr II at 24, 26-27). Defendant admitted the drugs were his and that he intended to sell them (M Tr at 25; Tr I at 32-33, 91-92).

Several months before trial, defendant moved to suppress the evidence obtained as a result of the dog sniff. The trial court ruled that the traffic stop was proper because Trooper Daniels had observed defendant change lanes improperly (M Tr at 50). Defendant had also engaged in furtive actions as if he were trying to hide something. *Id.* at 50-51. Defendant had exhibited extreme nervousness and had not shut the patrol car door, which, in Daniels' experience, was unusual. *Id.* Defendant's and Brown's accounts were somewhat inconsistent. *Id.* Finally, the ten-minute detention while awaiting the drug dog was not excessive.[5] *Id.* at 52. The trial court denied the motion to suppress. *Id.*

Defendant moved for suppression again after the proofs were closed at trial (Tr II at 37-41). By this time, the trial court had viewed the relevant portions of Daniels' squad car video, which was admitted into evidence[6] (Tr I at 50-51; Tr II at 33-37). This motion focused mainly on the validity of the traffic stop itself (Tr II at 37-41). But defendant did note the United States Supreme Court's recent holding in *Rodriguez v United States*, ___ US ___; 135 S Ct 1609, 1616; 191 L Ed 2d 492 (2015), in which the Court held that absent reasonable suspicion of criminal activity, prolonging a traffic stop for even a brief time in order to conduct a drug dog sniff

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[5] At the time the trial court ruled on defendant's first motion to suppress, the United States Supreme Court had not yet issued its opinion in *Rodriguez v United States*, ___ US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015). So it was arguable that a brief additional detention was permissible to allow a drug dog sniff after a traffic stop was concluded. *People v Kavanaugh*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 330359); slip op at 4.

[6] In accordance with instructions from the Clerk's Office, the People will provide copies of this video recording to the Court once a docket number is assigned to the case. Defense counsel has a copy already.

violates the Fourth Amendment. The trial court denied the motion to suppress on essentially the same grounds as before (Tr II at 51-52).

The Court of Appeals reversed. *People v Kavanaugh*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 330359); slip op at 1. The Court watched a copy of Daniels' squad car video and relied on its own factual conclusions from it. *Id.* at ___; slip op at 2. The Court did not agree that defendant showed "unusual or increasing levels of nervousness" when talking with Daniels. *Id.* at ___; slip op at 5. But the Court conceded that the video did not show defendant handing his license to Daniels (and therefore could not verify or contradict Daniels' testimony that defendant's hands shook when he handed over his license). *Id.* The Court also said that defendant's opportunity for eye contact with Daniels was "greatly limited" or even "not available" because Daniels was often looking at his computer screen. *Id.* at ___; slip op at 6. Defendant's failure to shut the patrol car door, the Court said, was not suspicious, and the inconsistencies between defendant's and Brown's statements were not significant and did not point to criminal activity. *Id.* at ___; slip op at 6-7. The Court of Appeals concluded that Daniels lacked lawful grounds to detain defendant after the traffic stop was over. *Id.* at ___; slip op at 2.

Additional facts will be set forth as needed in the argument.

ARGUMENT

I. In holding that the police lacked reasonable suspicion to prolong the traffic stop, the Court of Appeals applied the wrong standard of review to the trial court's factual findings based on a video recording and ignored the defendant's apparent attempt to hide something. Absent these errors, the evidence supported the trial court's conclusion that reasonable suspicion existed. This Court should reverse the Court of Appeals and clarify that the clear error standard of review applies to factual findings based on video evidence.

Standards of Review. The trial court's factual findings in a suppression hearing are reviewed for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Questions of law related to a motion to suppress are reviewed de novo. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007).

The Court of Appeals erred in overturning the trial court's ruling that Trooper Daniels had reasonable suspicion justifying the extension of the traffic stop so that a drug dog could be called. By using the wrong standard of review for one of the factors supporting the trial court's decision, and by ignoring another factor altogether, the Court of Appeals changed the calculus underlying that decision.

A. Trooper Daniels needed only reasonable suspicion to extend the traffic stop to allow a drug dog sniff.

The United States Supreme Court has "long held that the 'touchstone of the Fourth Amendment[7] is reasonableness.'" *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996). Reasonableness is measured by examining the totality of the circumstances. *Id.*

[7] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [US Const., Am IV]

In analyzing the propriety of a traffic stop and the resulting detention, a court must apply the standard set forth in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Under *Terry*, the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception,[8] and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 US at 20.

The use of a narcotics-detection dog during a valid traffic stop is not a search within the meaning of the Fourth Amendment because it does not implicate any legitimate privacy concerns. *Illinois v Caballes*, 543 US 405, 408-409; 125 S Ct 834; 160 L Ed 2d 842 (2005). Thus, Trooper Daniels did not need probable cause to support a search in order to conduct the dog sniff. *People v Lewis*, 251 Mich App 58, 73; 649 NW2d 792 (2002). Instead, Daniels was required to have only reasonable suspicion of criminal activity to justify prolonging the stop in order to conduct the dog sniff. *Rodriguez v United States*, ___ US ___; 135 S Ct 1609, 1615; 191 L Ed 2d 492 (2015); *Navarette v California*, 572 US ___; 134 S Ct 1683, 1687-1688; 188 L Ed 2d 680 (2014). Reasonable suspicion "requires … 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." *Navarette*, 134 S Ct at 1687, quoting *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989). It need not rule out the possibility of innocent conduct. *United States v Arvizu*, 534 US 266, 277; 122 S Ct 744; 151 L Ed 2d 740 (2002). It "takes into account 'the totality of the circumstances—the whole picture.'" *Navarette*, 134 S Ct at 1687, quoting *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981).

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[8] The Court of Appeals correctly held the traffic stop was proper because Daniels had probable cause to believe defendant had committed a traffic violation. *Kavanaugh*, ___ Mich App at ___; slip op at 2-3.

In particular, "[t]he determination whether a traffic stop is reasonable must necessarily take into account the *evolving circumstances* with which the officer is faced." *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005) (emphasis added). Thus, "when a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Id.*, citing *People v Burrell*, 417 Mich 439, 453; 339 NW2d 403 (1983).

B. The Court of Appeals erred as a matter of law by substituting a de novo standard of review for the clear error standard in reviewing the trial court's factual findings drawn from the video recording.

Even if this Court grants no other relief in this case, it should reject the Court of Appeals' implicit substitution of a de novo standard of review for the clear error standard with respect to factual findings based on video evidence.

The trial court's determinations of reasonable suspicion rested partly on findings that defendant was extremely nervous during his encounter with Trooper Daniels, and that Daniels was credible (M Tr at 51; Tr II at 52). Nervous, evasive behavior is a circumstance supporting reasonable suspicion. *Lewis*, 251 Mich App at 72; *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 14 L Ed 2d 570 (2000). While "generic nervousness" of the level most people might exhibit when stopped by the police is of little significance, "[e]xtreme and continued nervousness … is entitled to somewhat more weight." *Flood v State*, 169 P3d 538, 546 (Wyo, 2007) (quotations omitted). It is "telling information … whether the citizen calmed after the initial few minutes of the encounter." *Id.*, quoting *Damato v State*, 64 P3d 700, 708 (Wyo, 2003).

Trooper Daniels noticed that defendant's hand was shaking when he handed over his driver's license (M Tr at 18; Tr I at 20). The nervousness only increased when Daniels had

defendant sit in his patrol car. Defendant left the patrol car door open, scratched his leg and head, did not make eye contact, and repeatedly looked out the passenger-side door, where his body was pointed (M Tr at 20; Tr I at 22). He displayed more nervousness than Daniels typically observed during a traffic stop (M Tr at 35-36). The trial court noted that defendant's nervousness "went beyond" that of most people stopped by Trooper Daniel. *Id.* at 51.

The standard of review for factual findings – without regard to the type of evidence on which they are based – is clear error. *Jenkins*, 472 Mich at 31. It is a very deferential standard. To be clearly erroneous, a factual finding must strike the reviewing court "as more than just maybe or probably wrong; it must strike [the court] as wrong with the force of a five-week old, unrefrigerated dead fish." *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996) (Boyle, J.), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988).

But the Court of Appeals has gradually weakened that standard with respect to video evidence until it is now, in effect, de novo. The Court has done this not because of any focused analysis of the nature of video evidence, but by extrapolation from cases dealing with the interpretation of documents. But a video recording is not a cold transcript. Like all other physical evidence, video is limited and subject to interpretation.

For its notion that a reviewing court need not defer to a trial court's findings about what a video recording contains, the Court of Appeals relied on *City of East Grand Rapids v Vanderhart*, unpublished opinion per curiam[9] of the Court of Appeals (Docket No. 329259, issued July 6, 2017), slip op at 4 (Opinion by Swartzle, J.) *Kavanaugh*, ___ Mich App at ___; slip op at 2. Judge Swartzle, in turn, relied on *People v White*, 294 Mich App 622, 633; 823

[9] The Court of Appeals cited *Vanderhart* as though it were a published opinion. *Kavanaugh*, ___ Mich App at ___; slip op at 2.

NW2d 118 (2011), in which the Court said that because it could review an "audio/video disk" as easily as the trial court, the clearly erroneous standard "may not even apply." This was dictum, since the Court went on to affirm the lower court's conclusion from the audio/video disk even under a de novo standard of review. *White*, 294 Mich App at 633. To support that dictum, *White* cited *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130 n 1; 743 NW2d 585 (2007), and *People v Zahn*, 234 Mich App. 438, 445–446; 594 NW2d 120 (1999). *Harbor Park Market*, in which the trial exhibits appear to have been only documents, said that there was "some authority for the proposition that little or no deference is due a trial court's findings of fact when they are based solely on transcripts and exhibits." *Harbor Park Market*, 277 Mich App at 130 n 1, citing *Zahn*, 234 Mich App at 445-446. This was also dictum: "[B]ecause our decision is based solely on the contract language, we need not decide what deference is due the factual findings made in this case." *Harbor Park Market*, 277 Mich App at 130 n 1. And in *Zahn*, the Court observed that in the case before it, "the trial court made its decision solely on the basis of the preliminary examination transcript. Therefore, the trial court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's 'findings.'" *Zahn*, 234 Mich App at 445-446.

In short, the Court of Appeals' statements (often dicta) about applying the clear error standard evolved from a case in which only a transcript was involved to eventually encompass review of video evidence – with little or no consideration given to how interpreting video evidence might differ from interpreting a document.

There is a better way. The Indiana Supreme Court recently examined the standard of review to be applied to video evidence on appeal. Defendant Royce Love was convicted of resisting law enforcement and battery to a law enforcement animal. *Love v State*, 73 NE3d 693,

695-696 (Ind, 2017). Love failed to pull over when the police initiated a traffic stop because Love had disregarded a stop sign. *Id.* at 695. When Love was eventually stopped and exited his vehicle, he was apprehended through the use of a taser and a police dog. *Id.* The dispute was whether Love had cooperated with the police initially upon getting out of his car. *Id.* at 685-696. The Indiana Court of Appeals reversed Love's convictions, finding that a video recording from one of the police officer's cars unambiguously showed that Love cooperated with the police almost immediately. *Id.* at 696. The Indiana Supreme Court granted a petition to transfer from the Court of Appeals, which, under Indiana appellate rules, automatically vacated the Court of Appeals decision. *Id.* at 695, 696.

The Indiana Supreme Court noted that video evidence admitted in a trial court was subject to review "just like any other evidence." *Love*, 73 NE3d at 698, citing *Robinson v State*, 5 NE3d 362, 366 (Ind, 2014). But, "just like any other type of evidence, video is subject to conflicting interpretations." *Love*, 73 NE3d at 698, quoting *Robinson*, 5 NE3d at 366. The Court cited an example from the United States Supreme Court:

> In *Scott v Harris*, 550 US 372; 127 SCt 1769; 167 LEd2d 686 (2007), Justice Scalia, writing for the majority of the Court, described a videotape as showing "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380; 127 SCt 1769. Based largely on his impression of that video, he concluded police were justified in using deadly force to end the pursuit. *Id.* at 386; 127 SCt 1769. Justice Stevens, dissenting, described the very same video as "hardly the stuff of Hollywood" and opined it did not show "any incidents that could even be remotely characterized as 'close calls.' " *Id.* at 392; 127 SCt 1769 (Stevens, J., dissenting). [*Robinson*, 5 NE3d at 366.]

Scott, the *Love* Court said, "highlights the split among courts regarding the standard of review that apply to video evidence on appeal." *Love*, 73 NE3d at 698. Some jurisdictions applied a de novo standard, and some, like Indiana, applied a deferential standard. *Id.* The question that remained in Indiana, however, was "when does review of video evidence become

impermissible reweighing. For there may be times when reasonable minds could disagree about interpretation of the video evidence or times when the video is unclear or does not capture the entire event." *Id.* Yet at other times, objective video evidence might be complete and might indisputably contradict other evidence. For example, where the issue is whether a defendant consented to a search, video might show that the defendant indisputably said "no" when the police asked to search, despite police testimony that the defendant consented. *Id.*

The Court held that "for video evidence, the same deference is given to the trial court as with other evidence, unless the video evidence at issue indisputably contradicts the trial court's findings." *Love*, 73 NE3d at 700. "A video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion." *Id.* Because the video in *Love* was dark and difficult to make out, and because it did not show critical events like the use of the tasers and the police dog, the video did not indisputably contradict the police officers' testimony. *Id.* So the Court deferred to the trial court's factual determinations and affirmed Love's convictions. *Id.*

The *Love* Court found guidance in *State v Carmouche*, 10 SW3d 323, 332 (Tex Crim App, 2000). *Love*, 73 NE3d at 699. *Carmouche* involved an indisputable contradiction between video evidence and witness testimony. The issue was whether the defendant had consented to a search of his person. Videotape from a patrol car's camera showed a different sequence of events from what the police officer described. *Carmouche*, 10 SW3d at 331. The officer testified that he asked the defendant, "Do you mind if I search you again?" whereupon the defendant threw his hands up, said, "All right," turned around, and put his hands on his car. *Id.* But the videotape showed that the police ordered the defendant to turn around and put his hands

on the car, that the defendant complied, and that only then did the officer ask, "Mind if I pat you down again?" as he was already reaching for the defendant's crotch area. *Id.* at 332.

"In the unique circumstances of this case," the Court "decline[d] to give 'almost total deference' to the trial court's implicit findings:"

> [T]he nature of the evidence presented in the videotape does not pivot on an evaluation of credibility and demeanor. Rather, the videotape presents indisputable visual evidence contradicting essential portions of [the police officer's] testimony. In these narrow circumstances, we cannot blind ourselves to the videotape evidence simply because [the officer's] testimony may, by itself, be read to support the Court of Appeals' holding. [*Carmouche*, 10 SW3d at 332.]

But absent such an indisputable contradiction, the *Love* Court observed, Texas courts "'give almost total deference to the trial court's factual determinations'" based on video evidence. *Love*, 73 NE3d at 699, quoting *State v Houghton*, 384 SW3d 441, 446 (Tex App, 2012). The Indiana Supreme Court found this to be "a workable approach that allows for appropriate deference to the trial court unless and until there is a reason such deference is not appropriate." *Love*, 73 NE3d at 699. But the Court cautioned:

> To be clear, in order that the video evidence indisputably contradict the trial court's findings, it must be such that no reasonable person could view the video and conclude otherwise. When determining whether the video evidence is undisputable, a court should assess the video quality including whether the video is grainy or otherwise obscured, the lighting, the angle, the audio and whether the video is a complete depiction of the events at issue, among other things. In cases where the video evidence is somehow not clear or complete or is subject to different interpretations, we defer to the trial court's interpretation. [*Id.* at 699-700.]

This Court should correct the Court of Appeals' standard of review for findings of fact based on video evidence, which is essentially de novo, in favor of the well-reasoned standard in *Love* and *Carmouche*. Under this standard, the squad car video does not indisputably contradict Trooper Daniels' testimony. First, as the Court of Appeals admitted, *Kavanaugh*, ___ Mich App

at ___; slip op at 5, the video is incomplete. It does not show defendant passing his driver's license to Daniels, during which Daniels saw defendant's hand shaking (M Tr at 18; Tr I at 20).

And contrary to the Court of Appeals' opinion, the video does show defendant avoiding eye contact with Trooper Daniels. Examples of this appear at 7:39, 7:46, 8:41, 9:06, 11:14, and 11:41. In other instances, defendant glances at Daniels only briefly, then looks away. At some additional points, it cannot be said with certainty whether Daniels is looking at defendant or not because the bill of Daniels' hat hides his eyes. When Daniels returns to the squad car after talking to Brown and asks defendant whether there are any drugs in the car, defendant faces forward and does not look at Daniels for ten seconds, despite Daniels' looking at him. Video, 15:00 – 15:10. The video also confirms other signs of nervousness to which Daniels testified, including scratching and looking out the passenger door. At the very least, it is disputable among reasonable people whether the video shows defendant acting nervously and avoiding eye contact with Trooper Daniels. The Court of Appeals should have deferred to the trial court's findings based on the video evidence.

This error affected more than just the Court of Appeals' discounting of defendant's nervous behavior. The Court's misguided analysis also colored its view of Trooper Daniels' credibility in general: "The disparity between the officer's testimony and the events recorded on the videotape, particularly as it concerns the officer's testimony about defendant's nervousness, also raises questions about the trial court's finding that the officer was credible." *Kavanaugh*, ___ Mich App at ___; slip op at 6 n 11. The Court's error thereby infected its entire opinion. This, together with the error discussed below, led the Court of Appeals to its incorrect determination that Trooper Daniels lacked reasonable suspicion to call for a drug dog.

C. The Court of Appeals erred as a matter of law by ignoring the trial court's factual finding that defendant made furtive movements as if to hide something as he was pulling over.

Trooper Daniels testified that as he was pulling over in response to Daniels' signals, defendant appeared to make furtive movements as though trying to hide something (M Tr at 17-18, 35; Tr I at 17-18). The Court of Appeals agreed that Daniels "could have seen" defendant making movements "as if to place something on the floor of the car" as defendant was driving along the exit ramp after Daniels had signaled for him to pull over.[10] *Kavanaugh*, ___ Mich App at ___; slip op at 5 n 10. But the Court of Appeals never mentioned this fact again. It played no part in the Court's review of whether Daniels' decision to call for a drug dog was based on reasonable suspicion. This was error.

Furtive behavior is a factor supporting reasonable suspicion. See *People v Muro*, 197 Mich App 745, 748; 496 NW2d 401 (1993). In fact, although not sufficient alone, furtive behavior can help establish the higher degree of proof required for probable cause to search. *People v Howell*, 394 Mich 445, 447; 231 NW2d 650 (1975).

It is significant that as a police officer was pulling him over, defendant found it necessary to hide something before he even got the car stopped. But the Court of Appeals failed to consider it. This, like the Court's erroneous review of the trial court's findings regarding defendant's nervous behavior and about Trooper Daniels' credibility, led to the Court's inaccurate weighing of the factors supporting reasonable suspicion.

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[10] Although the fruits of a search cannot be used to justify the search itself, it is notable that contraband was found under defendant's seat (M Tr at 35; Tr I at 127-129; Tr II at 16). This strengthens the conclusion that Trooper Daniels saw the furtive gestures to which he testified.

D. When the above errors are corrected, the record supports the trial court's conclusion that Trooper Daniels had reasonable suspicion that justified extending the traffic stop to enable a drug dog sniff.

Correctly evaluated, the information Trooper Daniels had by the time he finished processing the traffic violation provided reasonable suspicion that justified detaining defendant and conducting a dog sniff for narcotics.

When Trooper Daniels initiated the traffic stop, he knew that the Metropolitan Enforcement Team had advised other police agencies to be on the lookout for defendant's car (M Tr at 26-27; Tr I at 54, 57-58). Defendant quickly exited the freeway without signaling as Daniels' car caught up with him (M Tr at 16; Tr I at 17). As discussed, Daniels saw defendant making furtive movements as he pulled over, as if he were trying to hide something. Defendant was also excessively nervous and often avoided eye contact with Daniels.

Defendant's account of his travel and his relationship with Brown, moreover, was inconsistent with Brown's account. Defendant and Brown gave different answers when asked what hotel they had stayed at in Grand Rapids (M Tr at 21-22, 40-41; Tr I at 22, 26). And whereas defendant said he and Brown were not boyfriend and girlfriend, Brown said they were (M Tr at 21; Tr I at 26, 73-74). Conflicting stories from the occupants of a vehicle about their travel locations can contribute to reasonable suspicion. See *Williams*, 472 Mich at 311, 317; *United States v Pack*, 612 F3d 341, 361-362 (CA 5, 2010).

The Court of Appeals accurately noted that defendant's and Brown's answers did not directly indicate criminal activity. *Kavanaugh*, ___ Mich App at ___; slip op at 7. But few answers to a police officer during a traffic stop would. And in any event, factors supporting reasonable suspicion are to be evaluated collectively, not isolated and dismissed individually as susceptible of an innocent explanation. *Arvizu*, 534 US at 274; *People v Oliver*, 464 Mich 184,

202; 627 NW2d 297 (2001). "*Terry* [*v Ohio*] … precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 US at 274. See also *Sokolow*, 490 US at 9 (holding that factors which by themselves were "quite consistent with innocent travel" collectively amounted to reasonable suspicion).

Examined together, these facts gave rise to reasonable suspicion that defendant was engaged in criminal activity, justifying the continued detention of defendant until the drug dog sniff could be conducted.

II. The Court of Appeals declared that "whenever practicable," parties "should" provide video evidence to the trial court, the trial court "should" review it, and it "should" be made part of the record on appeal. This language could be interpreted as imposing obligations instead of merely offering advice. This Court should clarify that parties and trial courts remain free to decide if and how to use video evidence.

Standard of Review. Whether the Court of Appeals, as a general matter, can oblige parties and trial courts to admit video evidence presents a question of law. Questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

The Court of Appeals lauded the benefits of video evidence to the point of virtually instructing prosecutors and defense attorneys on how to present their cases, and trial courts on how to manage their records:

> Real-time recordings of [police] encounters [with civilians] are of substantial assistance to both trial and appellate courts. Rather than relying on varied recollections and attempts to judge credibility, the court can, in large measure, hear and see the relevant facts for itself. This provides direct information and may also assist the court in assessing the reliability of witnesses who testify as to events seen on the tape. Absent a claim that the recording is incomplete or somehow unreliable it allows for fact-finding that does not depend on the vagary of memory or bias. Therefore, whenever practicable, such videotapes should be provided to the court, the court should review them, and they should be made part of the record on appeal. [*Kavanaugh*, ___ Mich App at ___; slip op at 5 n 8.]

The People agree that video evidence can be valuable. But it is neither a substitute for other evidence nor even a superior form of evidence, as the Court of Appeals seems to imply.

The Court's use of "should" is problematic. "Should" can be used to provide a simple suggestion ("You should buy this stock"). But it can also indicate "[o]bligation; duty; necessity." American Heritage Dictionary of the English Language, New College Edition, 1976, p 1199. If the Court's statements are read this way, they infringe on the autonomy of parties and trial courts. Parties have no more duty to present video evidence "whenever practicable" than to present photographs, fingerprints, DNA, or any other type of evidence whenever practicable.

Subject to the court rules on criminal procedure and the rules of evidence, each party in a criminal case "has discretion in deciding what witnesses and evidence to present." MCR 6.416. See also *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002) ("Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses.") Nor is a trial court's decision whether to make evidence part of the record any different with respect to video evidence. Instead, a trial court has discretion to admit or exclude evidence of any kind. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

Because the Court of Appeals, in this published case, could be interpreted as obligating the provision and use of video evidence, this Court should clarify that parties and trial courts have no such obligation.

REQUEST FOR RELIEF

The People ask this Court to hold that the clear error standard of review applies to factual findings based on video evidence, and to clarify that trial courts and parties have no greater obligation to use video evidence than to use any other evidence. The People further ask the Court to peremptorily reverse the Court of Appeals majority opinion and reinstate defendant's conviction. In the alternative, the People request that this Court grant leave to appeal.

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Respectfully submitted,

/s/ Aaron J. Mead

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